



Egypt: Telecommunication Regulation Law

April 2015





Contents







Introduction

In April 2015, the Association for Freedom of Thought and Expression (AFTE) and ARTICLE 19 analysed the Telecommunication Regulation Law of Egypt No. 10 of 2003 (the Law).

The Law in its current state served as legal basis for the general communication cuts during the Egyptian Revolution in January 2011. While this fact alone calls for an urgent review of the legislation, our analysis of the text has also shown that it contains a number of significant flaws from the perspective of international law on freedom of expression. We believe that the adoption of the Egyptian Constitution of 2014 – a major step towards democracy in spite of its shortcomings – has created an opportunity to review existing legislation and to bring it into conformity with constitutional requirements and international standards on human rights.[1]

The purpose of this analysis is to advance recommendations aimed at improving the Law, thereby increasing the protection of fundamental freedoms in Egypt in accordance with the 2014 Constitution and international standards.[2]

The Law has created a legal framework for the regulation of communication networks and services, which aims to secure optimum usage of the frequency spectrum, to guarantee the provision of communication services to all regions of the country, including the remote areas, to safeguard the confidentiality of telecommunications, and to set up a regulatory authority for the sector of communications. While these are laudable goals, it nevertheless appears that the Law fails to sufficiently safeguard fundamental human rights, in particular the right to freedom of expression as well as the right to privacy.

AFTE and ARTICLE 19 hope to contribute to discussion on the review of the Law and ultimately to improve the protection of freedom of expression in the country.

1 In December 2013, ARTICLE 19 produced a thorough analysis of the draft Constitution of Egypt (version of December 2013) from the perspective of international human rights standards, in particular on freedom of expression and freedom of information. The goal of this examination was to underline the positive features of the Draft Constitution as well as to draw attention to its negative aspects. Amongst a complete set of recommendations, our analysis notably suggested that "[t]he Constitution should state that the rights and freedoms - guaranteed by the Constitution - should be interpreted in line with the international human rights treaties binding on Egypt. It should also include a dedicated provision on the status of international law in the Egyptian legislation. In particular, it should state that international law should has primacy over internal law and cannot be invoked to justify a failure to adhere to international law." (Articles 92 and 93 of the Constitution mark a first step in that direction). The analysis was preceded by a May 2012 policy brief Egypt: Protection freedom of expression and freedom of information in the new Constitution..

2 Some of our recommendations build upon suggested amendments to the Law that were put forward by civil society organizations (forthcoming analysis):EIPR (Egyptian Initiative for Personal Rights), AFTE (Association of freedom of thought and expression), ADEF (Arabic Digital Expression Foundation),Support for Information Technology Centre (SITCE), and Arabic Network for Human Rights Information (ANHRI).





Summary of recommendations

1. The Law should be amended to guarantee the independence and autonomy of the National Telecommunication Regulation Authority (NTRA), in line with international standards for the protection of freedom of expression;
2. The remit of the NTRA should include the protection and promotion of freedom of expression as defined by international human rights law. In that sense, a reference to relevant international treaties and to the Egyptian Constitution should be made in the definition of the regulator's missions;
3. The licence scheme should be limited to cases where public regulation is justified, such as the regulation of the frequency spectrum or the regulation of public works necessary to set up a telecommunication network. At least the main rules and principles applying to the licensing scheme (e.g. conditions linked to the obtainment of a licence and financial matters related to the obtainment and operating of a licence) should be specified in the law;
4. The duration of licences should be established in the Law and that the conditions for renewal should be set with the goal of favouring the continuation of existing networks. In addition, the Law should include a general duty for the NTRA to state in detail the possible reasons for granting, rejecting or revoking a licence application. Judicial review of the regulator's decision should be available in all cases;
5. The NTRA should follow the principle of "maximum disclosure" that should preside over the dissemination of public information, as under international law related to the right to information. The NTRA should also be bound to report to the public at large on its operations, notably through an annual report;
6. Restrictions on the import, manufacture and commerce of communication equipment should be limited to the setting of technical standards required to ensure an efficient operation of the networks;
7. Article 64 of the Law should be amended. It should state that any surveillance or interception of communication must respect the requirements of international human rights law, in particular the rights to freedom of expression and information and privacy. In that sense, prior authorization by a court of law is an essential requirement. Furthermore, resorting to surveillance or interception should only be authorized in cases of absolute necessity and in the absence of any other less intrusive means to achieve a similar result;
8. Article 64, regarding collection of information about users by providers and operators, should be revised in order to meet the requirements of international law regarding the protection of personal data;
9. The prohibition from using encryption technologies should be removed from the Law;
10. The possibility of cutting off access to the Internet of whole population should be abolished and prohibited in the entirety;
11. Article 67 should precisely specify which public authorities are competent in cases of emergency. In addition, their powers in times of emergency should be redefined and limited to the least restrictive measure required to face genuine perils to national security. In any case, the Law should ensure that any disconnection of a specific service only happens after a prior judicial approval and for limited, specific circumstances allowed under international law;





12. Part 7 of the Law should be revised; in particular, Article 76 of the Law should be abolished in its entirety.





Background

The right to freedom of expression and information is a fundamental human right. The full enjoyment of this right is central to achieving individual freedoms and to developing democracy, particularly in countries transitioning to democracy. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of all human rights.

Even before the adoption of the new Constitution, the Egyptian Council of State had elaborated on the meaning of freedom of expression.

At the end of January 2011, the Egyptian Government shut down the mobile phone network and the internet for five days, in response to protests which began on 25 January. The decision to shut down communications was done based on a decree, adopted by committees made up of national security organs: the Presidency, the Ministry of the Interior, and the security forces, among others. The authorities used the powers set out in Part 6 of the Law, which grants wide powers to vaguely defined 'competent authorities' to subject telecommunications to their administration in specific circumstances: natural or environmental disasters, periods of general mobilization, or 'any other cases concerning National Security' (Article 67). The Ministry of Interior issued decrees to shut down mobile phone and internet services on 28 January 2011, and the NTRA played a central role: implementing the decree, and coordinating with telecommunications companies.

In April 2011, human rights activists at the Council of State – Egypt's Supreme Administrative Law Court, challenged the decree; they asked the Council of State to overturn the January 2011 decree and to compensate the Egyptian people for the losses they suffered as a result of the shutdown. The Council's judgement from May 2011 on this case represents an important interpretation of the Law [3] and - unexpectedly advanced definitions of certain terms in the Law, such as "national security." The judgement also commented authoritatively on the powers of the NTRA and its role in the operation of the shutdown; in particular the judges gave a detailed account of the NTRA's role in every stage of the internet shutdown, showing that the NTRA was the representative of the ministry of telecommunications and information technology in the operations room which managed the shutdown – alongside representatives from the armed forces and the security services. [4]

The judges framed their legal argument around (what they termed) "the right to communicate,"[5] which they defined as fundamental to citizenship:

3 Decision of 28 May 2011 of the Council of State, Administrative Judges Court, Division of Economic and Investment Litigation, in case number 21855/65.

4 Decision 21855/65, p. 27, 32-33.





> [T]he right for all individuals and groups and organizations to participate and to use media of and communications services and information sources … and the attainment of the greatest amount of public participation in the process of communication. Different individuals and social groups are not restricted to passively receiving information, but their role extends to grow into positive participation, and to [rights that] derive from the right to communicate, such as the right to obtain information and knowledge and to find out about the experiences of others, and the right to [free] expression and to impart facts to others, and to communicate with them and discuss them, and to influence social and political leaders.[6]

The judges developed the argument that the violation of the right to communicate amounted to an attack on national security. The Law defines national security as "that which relates to the Armed Forces, military production, Ministry of Interior and Public Security, National Security Authority, the Presidency and all authorities related to these entities" (Article 1.19). But the judges in the case argued for a more expansive definition of national security, which would include social justice, economic development, human dignity, and freedom. [7] They argued that Egypt's peaceful protestors did not threaten national security, only the security of a regime which (they argued) had lost its legitimacy. [8] Indeed, they argued that the government's shutdown of communications and Internet services exposed the security and the lives of Egyptians to unnecessary danger. They concluded that the January 2011 decree violated public freedoms and constitutional protections of the right to communicate, freedom of expression, privacy, press freedom and freedom of information. [9]

AFTE and ARTICLE 19 note that the description of the various dimensions of "the right to communicate" by the Council of State is substantially similar to the protection offered by international human rights law on freedom of expression. However, for the purposes of this analysis, it is important to rely on the most relevant international standards on freedom of expression and other human rights[10] as well as the new Egyptian Constitution (adopted after the Council's judgement)

---

5 The 'right to communicate' has served as an umbrella term that encompasses a number of existing rights. In spite of efforts by its advocates, the right to communicate has not led to the adoption of a distinct treaty. It essentially gathers rights that already exist and are rooted in the right to freedom of expression. For a commentary of the concept, see ARTICLE 19, Statement on the Right to Communicate, February 2003.

6 Case 21855/65, p. 13

7 *Ibid.*, p. 27-28.

8 *Ibid*, p. 29 and 39.

9 *Ibid.*, p. 40.

10 For more detailed list of of international standards, see ARTICLE 19, Egypt: Protection freedom of expression and freedom of information in the new Constitution, May 2012.




International and national human rights standards

Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) elaborates upon and gives legal force to many of the rights articulated in the UDHR. The ICCPR binds its 167 member states to respect its provisions and implement its framework at the national level. Egypt – like the majority of states in the region – has ratified, and is bound to implement into domestic law, the provisions of the ICCPR.

Article 19 ICCPR guarantees the right to freedom of expression in its first two paragraphs:

> 1. Everyone shall have the right to freedom of opinion.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Article 19 of the ICCPR binds the state authorities of Egypt as a matter of international law to implement into domestic law those rights contained therein.

The UN Human Rights Committee (HR Committee), as the monitoring body for the ICCPR, issued General Comment No. 34 in relation to Article 19 on 21 June 2011.[11] The General Comment constitutes an authoritative interpretation of the

---

11 HR Committee, General Comment No. 34, CCPR/C/GC/34, 21 June 2011.



minimum standards guaranteed by Article 19 of the ICCPR and provides a progressive and detailed elucidation of international law related to freedom of expression and access to information.

The Comment notes that Article 19:

> [R]equires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

We also note that the international freedom of expression standards, including those on permissible restriction on freedom of expression also apply to communication through digital media, such as the Internet and mobile telephony.[12]

Restrictions on the right to freedom of expression

The right to freedom of expression is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits limitations on the right only in very narrow circumstances; namely restriction on the right to freedom of expression:

- Must be **prescribed by law**. This requires a normative assessment; to be characterised as a law a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Ambiguous or overly-broad restrictions on freedom of expression fail to elucidate the exact scope of their application are therefore impermissible under Article 19(3).

- Must pursue a **legitimate protective aim** as exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR. Legitimate aims are only those that protect the human rights of others, protect national security or public order or protect public health and morals. General Comment No. 34 notes that extreme care must be taken in crafting and applying laws that purport to restrict expression to protect national security. Where a State imposes a limit on freedom of expression, the burden is on that state to show a direct or immediate connection between that expression and the legitimate ground for restriction.

- Must be **necessary and proportionate** to the aim sought. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires

12 *Ibid.*



that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result: as a principle, the least restrictive measure should be preferred.

As for the legitimate aim of protecting national security, we note that the *Johannesburg Principles*, a set of principles on freedom of expression and national security developed by a group of experts from around the world and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, offer useful guidance for the application of international standards on freedom of speech in times of genuine threat to the nation.[13] The second principle states that:

> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Independence of the regulatory body

The guarantee of freedom of expression applies with particular force to the media, including broadcast media and the relevant regulatory bodies. The need for protection of regulatory bodies against political or commercial interference was specifically emphasised in the 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, who considered:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[14]

Guaranteeing the independence of a regulator in practice involves various aspects. ARTICLE 19's publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,[15] a set of guidelines based on

13 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, October 1995.

14 The 2003 Joint Declaration, 18 December 2003.

15 ARTICLE 19, Access to Airwaves, London, March 2002.



comparative constitutional law and best practice in countries around the world, considers the following to be important:

> [The] institutional autonomy and independence of broadcast and/or telecommunications [regulatory bodies] should be guaranteed and protected by law, including in the following ways:
>
> 1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
>
> 2. by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
>
> 3. through the rules relating to membership;
>
> 4. by formal accountability to the public through a multi-party body; and
>
> 5. in funding arrangements.

Media pluralism

Under international law, States are required to promote media pluralism. In this connection, the establishment of an independent regulator is a key to ensuring plurality and diversity. This was confirmed in the Joint Declaration on Promoting Diversity in the Broadcast Media adopted in 2007 by the special mandates for the protection of freedom of expression of the UN, OSCE, OAS and African Commission, which stated:

> Regulation of the media to promote diversity, including governance of public media, is legitimate only if it is undertaken by a body which is protected against political and other forms of unwarranted interference, in accordance with international human rights standards.

Other aspects of the promotion of pluralism include equitable access to the airwaves; fair and transparent licensing processes; and the prevention of undue media ownership concentration. For example, for comparative perspective, we note that the African Charter on Broadcasting provides:

> 1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community....
>
> 5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content....
>
> 7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.[16]

16 The African Charter on Broadcasting 2001, adopted at a UNESCO Conference held on 3-5 May 2001 in Windhoek, Namibia, Part I..




Right to information

The scope of Article 19 of the ICCPR encompasses freedom of information, or the right of access to information. The right to receive and have access to information is the “flip side” of the right to freedom of expression or the right to impart information. But freedom of information is also a right of the public at large. It therefore guarantees a collective right of the public to receive information others wish to pass on to them.

The recognition of the right to information as an integral part of Article 19 of the ICCPR has been recognised widely, including by the HR Committee in the General Comment 34 and by special mandates on freedom of expression.[17] For example, the 2004 Joint Declaration of special mandates stated:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[18]

The 2006 Joint Declaration also highlighted that exceptions to the principle of maximum disclosure of information should be subject to the “harm” and “public interest” tests as follows:

- Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information.
- International public bodies and inter-governmental organisations should adopt binding policies recognising the public’s right to access the information they hold. Such policies should provide for the proactive disclosure of key information, as well as the right to receive information upon request.
- Exceptions to the right of access should be set out clearly in these policies and access should be granted unless (a) disclosure would cause serious harm to a protected interest and (b) this harm outweighs the public interest in accessing the information.
- Individuals should have the right to submit a complaint to an independent body alleging a failure properly to apply an information disclosure policy, and that body should have the power to consider such complaints and to provide redress where warranted.[19]

---

17 See the 2006 Joint Declaration of UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 20 December 2006; and the 2004 Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 6 December 2004.

18 The 2004 Joint Declaration, *Ibid.*



The content of the right to freedom of information has been elaborated in a greater detail in *The Public's Right to Know: Principles on Freedom of Information Legislation* in 1999 [20] as well as in numerous reports of the UN Special Rapporteur on Freedom of Expression, [21]

The right to privacy

Interference with an individual's ability to communicate privately substantially affects their freedom of expression rights. The right to privacy is protected in international law, including through Article 17 of the ICCPR, which states that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The UN Special Rapporteur on Freedom of Expression has noted that mass surveillance may "undermine people's confidence and security on the Internet, thus impeding the free flow of information and ideas online."[22] Also, the Special Rapporteur on Terrorism stated that:

> These surveillance measures have a chilling effect on users, who are afraid to visit websites, express their opinions or communicate with other persons for fear that they will face sanctions.... This is especially relevant for individuals wishing to dissent and might deter some of these persons from exercising their democratic right to protest against Government policy.[23]

As a practical matter, surveillance also affects the ability of the media to operate. Journalists are not able to effectively pursue investigations and receive information from confidential and other sources. Surveillance measures also inhibit individuals' ability to seek and receive information.

---

19 The 2006 Joint Declaration, *op.cit.*

20 ARTICLE 19, The Public's Right to Know: Principles on Freedom of Information Legislation (London, 1999).

21 See e.g., A/HRC/14/23 (paras.30 – 39) A/HRC/7/14 (paras.21 - 31); E/CN.4/2005/64 (paras 36 – 44) E/CN.4/2004/62 (paras 34 – 64); E/CN.4/2000/63 (paras 42 – 44; Annex II: The Public's Right to Know: Principles on Freedom of Information Legislation).

22 Report of the UN Special Rapporteur on FOE on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet, A HRC/12/27, 16 May 2011.

23 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37, 28 December 2009.




Moreover, the UN Special Rapporteur on Freedom of Expression, Frank La Rue, made recommendations on Internet freedom in his report in May 2011.[24] He pointed to the dangers of unchecked Internet surveillance for the free flow of information online. In particular, he stressed that States are required to adopt effective privacy and data protection laws in accordance with Article 17 of the ICCPR.

The Constitution of Egypt

The 2014 Egyptian Constitution provides for the protection of fundamental freedoms in several provisions Article 57 proclaims that:

> Private life is inviolable, safeguarded and may not be infringed upon.
>
> Telegraph, postal, and electronic correspondence, telephone calls, and other forms of communication are inviolable, their confidentiality is guaranteed and they may only be confiscated, examined or monitored by causal judicial order, for a limited period of time, and in cases specified by the law.
>
> The state shall protect the rights of citizens to use all forms of public means of communication, which may not be arbitrarily disrupted, stopped or withheld from citizens, as regulated by the law.

Freedom of expression is protected by Article 65, which states that

> [A]ll individuals have the right to express their opinion through speech, writing, imagery, or any other means of expression and publication.

Article 70 proclaims the freedom of the press:

> Freedom of press and printing, along with paper, visual, audio and digital distribution is guaranteed. Egyptians – whether natural or legal persons, public or private – have the right to own and issue newspapers and establish visual, audio and digital media outlets.
>
> Newspapers may be issued once notification is given as regulated by law. The law shall regulate ownership and establishment procedures for visual and radio broadcast stations in addition to online newspapers.

Article 71 prohibits to "censor, confiscate, suspend or shut down Egyptian newspapers and media outlets in any way" and permits limited exceptions only "in time of war or general mobilization." It also prohibits custodial sanctions for publication offences.

24 See the 2011 Report of the UN Special Rapporteur on Freedom of Expression, *op.cit.*





Analysis of the Law

The Law creates the NTRA (Part 2) and sets up the legal framework for allocation of licences and permits (Part 3) and management of the frequency spectrum (Part 4). It organizes the status of the government-held Egyptian Company for Telecommunication (Part 5) and grants the State authorities and the armed forces special powers to handle national security issues and in periods of general mobilization (Part 6). Finally, it determines the penalties for violation of its provisions (Part 7).

Although the Law deals with many technical matters related to the regulation of the communications sector, it engages the protection of the right to freedom of expression, especially in relation to the restriction on the basis of national security.

AFTE and ARTICLE 19 note a number of positive features of the Law, in particular:

- The Law aims to secure optimum usage of the frequency spectrum, guarantee the provision of communication services to all regions of the country, (including the remote areas), and safeguard the confidentiality of telecommunications (see Articles 4, 5, 6, 7, 13 and 50). It thus seeks to organize an efficient communication infrastructure over the whole country.
- It creates the NTRA, a regulatory authority, whose board of directors is open to a limited level of users' participation. Even if the inclusive composition of the NTRA remains a topic of concern (discussed below), this constitutes an interesting move towards an open, participatory composition of the NTRA which includes civil society amongst the stakeholders.

At the same time, the Law contains a number of provisions that fall short of the international freedom of expression standards. It also seriously impacts the capacity of individuals and media to access and use means of communication that are of utmost importance in today's technological landscape. The following section analysis the relevant provisions in greater extent.

Independence of the regulatory authority

As noted above, international freedom of expression standards mandate that bodies that exercise regulatory powers over the media and the communications sector in general should be independent of government. However, under the Law, the NTRA is too deeply embedded in the State apparatus:

- The NTRA is clearly “subordinated to the Minister” in charge of telecoms (Article 3).
- Its Board of Directors is directly appointed by the Prime Minister and presided over by the Minister in charge of telecoms (Article 12).
- The composition of the Board of Directors include:
  A counsellor from the Council of State, a representative of the Ministry of Defence, a representative of the Ministry of Finance, four representatives of the National Security Entities, a representative of the Radio and Television





Union, 6 members appointed by the Minister of Telecoms (including 3 experts and 3 public figures representing users), and a member appointed by the Federation of Egyptian Workers (Article 12).

- Article 18 provides that internal commissions of the NTRA are organised through a resolution of the Minister in charge of telecoms;
- In all matters of its area of competence, decisions are issued by resolutions of ministers concerned (Articles 6 and 13);
- Although it receives funds from the general budget of the State (Article 8), there is no guarantee that the funding will be perennial and sufficient for the remit of a functional regulatory authority;
- The remuneration of the directors is determined by the Prime Minister (Article 12) and the financial situation of the Executive President is conditional on a resolution by the Minister in charge of telecoms (Article 15). In other words, the executive of the regulatory body lives under considerable financial pressure from the government.

AFTE and ARTICLE 19 observe that the 2014 Constitution's section on independent bodies and regulatory agencies makes certain guarantees towards the independence of regulatory bodies, but does not mention the NTRA.[25] Hence, we recommend that NTRA be included in the list of regulatory agencies in the 2014 Constitution.

Pending an amendment to the Constitution, we suggest that the Law make an explicit reference to the guarantees enshrined in the 2014 Constitution and specify that the NTRA has a status at least equivalent to that of the regulatory authorities under Section 11, subsection 2, of the Constitution.

Recommendations

- The Law should be amended to guarantee the independence and autonomy of the NTRA in line with international standards for the protection of freedom of expression. Notably:
  - The board of directors of NTRA should be appointed through an open and democratic process, where appointment is made by the government or the parliament – the body that holds the democratic legitimacy and to which the regulatory authority should be accountable;
  - The composition of the NTRA's Board of directors should reflect society as a whole and include representatives of all stakeholders, including civil society;
  - The Law should state that directors must have relevant expertise and be independent from state authorities, from political parties and from commercial interests;
  - The remuneration of directors and management should be fixed in the law;
  - The NTRA should be guaranteed to receive sufficient funding with regard to its remit;
  - The NTRA should be accountable towards Parliament and the public, notably through an annual report.
- The remit of the NTRA should include the protection and promotion of freedom of expression as defined by international human rights law. In that

25 See Section 11, subsection 2, of the 2014 Constitution (Articles 215-221).



sense, a reference to the Constitution and relevant international treaties should be included in the definition of the regulator's missions.

Role and mission of the NTRA

Under Article 4.2, the NTRA regulates telecommunication services and encourages investment in the telecoms sector, with the objectives of "protecting national security and the State's top interests."

Independently of the over-broad definition of national security in the law (as discussed below), it must be noted that an independent regulator should not hold responsibility for protecting national security and the interests of the State.

Instead, AFTE and ARTICLE 19 suggest that the remit of the NTRA should include the protection and promotion of freedom of expression as defined by international human rights law. We thus recommend that a reference to the Constitution and relevant international treaties be included in the definition of the regulator's missions.

Recommendations

- Article 4.2. of the Law should be amended. In particular, the references to protection of national security and "state's top interests" should be removed. The remit of the NTRA should include the protection and promotion of freedom of expression.

Licenses and permits

Under the Law, authorization is required for the creation or operation of a telecommunication network, or the provision of telecommunication services (Article 21).

AFTE and ARTICLE 19 observe that since the definition of telecommunication service ("providing telecommunication through whatsoever mean") and of telecommunication ("any mean for transmitting or receiving signs, signals, messages, texts, images or sounds of whatsoever nature whether through wired or wireless communication") is broad, the requirement of a prior authorization for telecommunication services appears to be excessive with regard to international law.

We also recommend that the licence scheme be limited to cases in which public regulation is required, as is the case for regulation of the frequency spectrum or the organization of civil engineering works needed to set up a telecommunication network.

As concerns the process for obtaining licenses, we acknowledge that the Law provides a framework which includes a number of safeguards and precisions. Generally, it may not be possible to insert detailed rules regarding licenses into the law itself, as telecommunication is an area of high technical complexity, and it may be necessary to resort to secondary legislation. However, at least the main rules and principles applying to the licensing scheme, the conditions linked to the



obtainment of a licence, and financial matters related to the obtainment and operation of a licence, should be specified in the Law.

In addition to existing provisions, the Law should include a general duty for the NTRA to state in details the reasons for granting, rejecting or revoking a licence application. Judicial review of the regulator's decision should be available in all cases.

We also recommend that the duration of licenses should be established in the Law and that the conditions for renewal should be set in the law, favouring continuation of existing networks.

Where the operation of a network requires the right to use frequency or a frequency band in addition to the license to establish the network, there should be only one application process for both elements.

Furthermore, the decision process related to the planning of the frequency spectrum or the allocation of licences should be open and participatory.

Recommendations

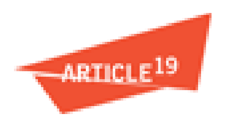
- The licence scheme should be limited to cases where public regulation is justified, as for instance is the case for the regulation of the frequency spectrum or the regulation of public works needed to set up a telecommunication network. Generally speaking, at least the main rules and principles applying to the licensing scheme, the conditions linked to the obtainment of a licence, and the financial matters related to the obtainment and operating of a licence, should be specified in the law;
- The duration of licences should be established in the Law;
- The conditions for renewal should be set in the Law with the goal of favouring continuation of existing networks;
- The Law should include a general duty for the NTRA to state in details the reasons for granting, rejecting or revoking a licence application;
- The Egyptian legislation should enable judicial review of the NTRA's decision in all cases.

Right to information

Article 32 of the Law creates a right for “persons concerned” to have access to data registered with the NTRA about the licensees authorized to operate networks or provide services. While it is indeed positive that a system exists for making this information available to the public, the right to know (a constitutive dimension of freedom of expression under international standards) demands that the information be readily available to any individual.

Article 58 specifies that the database of frequency spectrum users shall be classified in order to protect the privacy of users. It is not clear why information related to who is allowed to use a parcel of a public resource should be kept confidential.

Recommendations

- The Law or other legislation (e.g. dedicated law on access to information) should ensure that the NTRA follow the principle of “maximum disclosure” which should preside over the dissemination of public information, in accordance with international law related to the right to information;
- The NTRA should be bound to report to the public at large on its operations, through a comprehensive annual report.

Access to technology

Article 44 of the Law makes the import, manufacture or assembly of any telecommunication equipment conditional on a license from the NTRA. The NTRA itself needs to obtain prior consent from Armed forces. Article 46 prohibits the import of equipment for trading. The law defines telecommunication equipment in a broad manner.

The capacity to use technological equipment is a constitutive part of freedom of expression. AFTE and ARTICLE 19 acknowledge that it may be necessary to restrict commerce of telecommunication equipment in order to ensure compatibility with technical standards. Nevertheless, we insist that any limitation on the possibility of acquiring or using technology required operating or using telecommunication network or services should be compatible with the three-part test of international law.

Recommendations

- Restrictions to the import, manufacture and commerce of communication equipment should be limited to the aim of maintaining technical standards required to ensure an efficient operation of the networks.

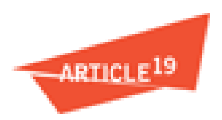
Privacy, personal data and encryption

Article 64.2, of the Law provides that the operators and providers of networks and services should allow armed forces and national security entities to have complete access to their systems in order to allow them “to exercise their powers within the law.”

This provision lacks clarity and is not consistent with constitutional and international protection privacy. In essence, it contributes to equipping the security forces with the capacity to monitor users without prior judicial authorization or any time limit.

It is generally understood that there is a strong connection between privacy and freedom of expression and that the invasion of privacy has a chilling effect on the individual’s right to free speech, and the capacity of the media to perform its role as a watchdog of the democratic society. In this respect, we recall that the UN Special Rapporteur noted that:

> [T]he right to privacy can be subject to restrictions or limitations under certain exceptional circumstances. This may include State surveillance measures for the purposes of administration of criminal justice, prevention of crime or combating terrorism. However, such interference is permissible only if the

> criteria for permissible limitations under international human rights law are met. Hence, there must be a law that clearly outlines the conditions whereby individuals' right to privacy can be restricted under exceptional circumstances, and measures encroaching upon this right must be taken on the basis of a specific decision by a State authority expressly empowered by law to do so, usually the judiciary, for the purpose of protecting the rights of others, for example to secure evidence to prevent the commission of a crime, and must respect the principle of proportionality.[26]

AFTE and ARTICLE 19 acknowledge that Article 64 mentions "due consideration to inviolability of citizens' private life as protected by law." However, we recommend that detailed requirements for the protection of privacy become an explicit part of the law.

Article 64 of the Law also authorizes the providers and operators to collect information about users from "individuals and various entities within the state." Such a broad authorization does not fit with the requirements of international law regarding the protection of personal data.[27]

The protection of personal data/data protection is recognised by the HR Committee as a fundamental part of privacy (Article 17 of the ICCPR). The HR Committee affirmed:

> The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by the State to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.[28]

The HR Committee has further indicated that the protection of personal data means that "every individual should have the right to ascertain in an intelligible form, whether, and, if so, what personal data is stored in automatic data files, and for what purposes."[29] Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right have his or her records rectified.

Article 64 prohibits the use of encryption equipment in a very general way, extending it to "telecom service operators, providers, their employees and users", unless authorisation is obtained from the NTRA, the Armed Forces and national security entities. Article 81 sets the criminal tariff for a violation of

---

26 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27

27 See, e.g. Article 19, Analysis of the Nigerian Personal information and data protection bill, 2013.

28 HR Committee, General Comment No 16, 08/04/1988.

29 *Ibid.*




Article 64 ("a penalty of confinement to prison and a fine of no less that 10.000 pounds and not exceeding 100.000 pounds"). As e-mail services, social network platforms and online payment services commonly uses encryption, this mechanism could result in an ordinary user being imprisoned or fined for using any encryption technology in the course of browsing the Internet. It would amount to a disproportionate restriction on freedom of expression to expect, as the current law can be construed to request, that an individual should obtain an authorization from various State authorities before creating an account on a social media platform.

In March 2015, ARTICLE 19 expressed its views on encryption and on the relation it bears to freedom of expression.[30] We have concluded that

> Encryption is essential to ensuring the security of information, the integrity of communications and the right to privacy online. It is also a vital tool for the protection of freedom of expression on the Internet as well as the circumvention of surveillance and censorship.[31]

As a consequence, we consider that "measures such as blanket bans on the use of encryption by end- users, and the installation of back-doors compromising the integrity of private communications software are hopelessly disproportionate and, as such, incapable of justification under international law."

Recommendations

- Prohibition from using encryption technologies should be removed from the Law and the Law should include detailed requirements of the protection of freedom of expression and privacy;
- The provisions of Article 64 regarding collection of information about users by providers and operators, should be revised in order to meet the requirements of international law regarding the protection of personal data;
- Article 64 should state that any surveillance or interception of communication must respect the requirements of international law in the fields of privacy as well as of freedom of expression and right to information. In that sense, the prior authorization of a court of law is an essential requirement. In addition, resorting to surveillance or interception should only be authorized in the case of absolute necessity and in the absence of any other, less intrusive, means to achieve a similar result;
- The Egyptian Government as well as NTRA should also put in place programmes for the promotion of encryption in internet communication, promote end-to-end encryption as the basic standard for the protection of the right to privacy online; promote the use of open source software and invest in open source software to ensure that it is regularly and independently maintained and audited for vulnerabilities

30 ARTICLE 19, Response to UN Special Rapporteur's Call for Comments on Encryption and Anonymity Online, February 2015.

31 *Ibid.*




National security

In Article 1 of the Law, the definition of “national security” covers anything related to the army, the Ministry of Interior or the Presidency.

AFTE and ARTICLE 19 recall that under international standards, national security is a legitimate aim that can justify a restriction to fundamental freedoms, but only insofar as it is understood to refer to an actual threat to the security of the nation. The current definition might encompass any reference loosely linked to the armed forces, the presidency or other authorities. As such, the over-broad definition creates a possibility that the law will be applied beyond the limitations set by international standards or the Constitution. We recommend that the definition of national security be revised in order to cover only actual threats to the security of the nation. In addition, the definition of national security should explicitly refer to the respect of international protection of fundamental freedoms.

The over-broad definition of national security paves the way to possible abuses of Part 6 of the law (“national security and national mobilization”).

More specifically, Article 67 gives State competent authorities the power to seize control of any telecommunication service of any operator or provider in the case of natural or environmental disaster, or during “declared periods of general mobilization” (in reference to the law no. 87 of 1960) or “any other case concerning national security”.

The Law does not even clarify who the “competent authorities” are, thus increasing the likeliness of abuse. Furthermore, Article 67 provides for a complete seizure of control of communication services and networks by the State, which amounts to a severe and sweeping restriction of freedom of expression.

We also recall that the State authorities used Article 67 as the legal basis to cut all communication services in January 2011. [32]

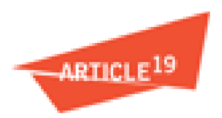
Additionally, under the international standards, cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) is a disproportionate interference with the right to freedom of expression and can never be justified, including on public order or national security grounds (the same applies to slow-downs imposed on the Internet or parts of the Internet).[33]

The *Johannesburg Principles* provide authoritative guidance on narrow tailoring of provisions related to national security. The Principles state that

---

32 See Decision of 28 May 2011 of the Council of State, Administrative Judges Court, Division of Economic and Investment Litigation, in case number 21855/65.

33 *C.f.* 2011 Joint Declaration, *op.cit.* and the 2011 Report of the UN Special Rapporteur on FOE, *op.cit.*.

> In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law. [34]

AFTE and ARTICLE 19 recognise that in times of genuine emergency, there may be legitimate grounds for the authorities to adopt exceptional measures, e.g. requiring public broadcasters to carry emergency announcements, etc. However, we remain seriously concerned that Article 67 of the Law could be used, as it has been in the past, by the authorities, for example, to indiscriminately clampdown on means of communication under false pretences of an "emergency." In our view, this provision entirely fails to meet the strict legality and proportionality tests laid down in the ICCPR.

Recommendations

- The possibility of cutting off access to the Internet of whole population should be abolished and prohibited in the entirety;

- Article 67 of the Law should precisely specify which public authorities are competent in cases of national emergency. In addition, their powers in times of emergency should be redefined and limited to the least restrictive measure needed to face genuine perils to national security. In any case, the Law should ensure that any disconnection or shutting down of a specific service happens only after a prior judicial approval and for limited, specific circumstances allowed under international law.

Sanctions

While the sanctions under Part 7 of the Law are generally excessively severe, we observe that Article 76 penalizes the intentional misuse of telecommunication for disturbing or harassing a third party. Such broad language is incompatible with the requirements of international law i.e. that restrictions on freedom of expression be precisely worded (legal basis) and narrowly tailored (proportionality).

Recommendations

- Part 7 of the Law should be revised; Article 76 should be abolished in its entirety.

34 The Johannesburg Principles, *op.cit.*, Principle 3.





About AFTE and ARTICLE 19

AFTE is a Group of lawyers and researchers working in non-profit and independent legal firm, which is established accordance to Egyptian legal profession law, under the name of "Association for Freedom of Thought and Expression"(AFTE).

In the light of Egyptian constitution, universal declaration and international treaties, AFTE is interested in issues related with defending, promoting and protecting freedoms of thought and expression in Egypt.

AFTE works on producing researches, monitoring, documentation and providing direct legal aid through diverse programs: The Academic Freedom and Student Rights, Freedom of Media, Digital freedoms, Right to know, Creativity freedom, and The Memory and Conscience.

Website: afteegypt.org

Email: info@afteegypt.org

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. ARTICLE 19's Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals, as well as existing laws that affect the right to freedom of expression, and develops policy papers and other documents. This work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All materials developed by the Law Programme are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this policy brief further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.



This analysis is wholly financed by the Swedish International Development Cooperation, Sida. Sida does not necessarily share the opinions here within expressed. ARTICLE 19 and AFTE bear the sole responsibility for the content of the analysis.